EDITOR'S NOTE

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No. 89-6332

In The Supreme Court of the United States

October Term, 1989

ROBERT S. MINNICK

PETITIONER

VERSUS

STATE OF MISSISSIPPI

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSISSIPPI

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Whether, Once An Accused Has Expressed His Desire To Deal With Law Enforcement Officers Only Through Counsel, The Police May Reinitiate Interrogation In The Absence Of Counsel As Soon As The Accused Has Completed One Consultation With A Lawyer?[1]

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[1] This is the question presented as found in the petition for certiorari on which the Court granted certiorari. The question found in petitioner's brief on the merits differs markedly.

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NO. 89-6332

IN THE SUPREME COURT OF THE UNITED STATES
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ROBERT S. MINNICK,
Petitioner

versus

STATE OF MISSISSIPPI,
Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSISSIPPI

BRIEF OF RESPONDENTS

This matter is before the Court on the Petition of Robert S. Minnick for a Writ of Certiorari to the Supreme Court of The State of Mississippi wherein the Court affirmed his two convictions of capital murder and sentences of death.

OPINIONS BELOW

The opinion of the Mississippi Supreme Court affirming the two

convictions and death sentences is reported as Minnick v. State, 551 So.2d 77 (Miss.1988). The opinion is reprinted at JA 69.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under the authority of 28 U.S.C. §1257(3) challenging the constitutionality of his convictions.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has adequately identified the pertinent constitutional provisions involved and set them forth in the Statutory Index to his brief.

STATEMENT OF THE CASE

A. Substantive Facts:

The facts of these brutal murders as reflected by the record in this case show that on April 25, 1986, Robert Minnick and James "Monkey" Dyess escaped from the

Clarke County, Mississippi, jail. Having successfully absconded from the jail, Minnick and Dyess hid in the woods in rural Clarke County overnight. The next morning they began making good their escape by walking out of the county. In the early afternoon, they approached the mobile home of Donald Ellis Thomas in rural Clarke County. They broke into the trailer to look for guns. As they were collecting the guns they found, Thomas returned home accompanied by Lamar Lafferty and his two-year-old son, Brandon Lafferty. Dyess jumped out of the trailer and shot Thomas in the back with a shotgun and then in the head with a pistol. Minnick shot Lamar Lafferty. They put two-year-old Brandon on the sofa in the living room of the trailer and continued collecting guns and ammunition.

While petitioner and Dyess were still inside, another car arrived containing two girls, Marty Thomas, Ellis Thomas' younger sister, and Desiree (B.B.) Beech. Petitioner went out and met them. He was carrying a pistol. Petitioner told the driver to give him the keys and get out of the car if they wanted to live. The petitioner marched the girls to the back of the trailer where they were met by a black man holding either a shotgun or a rifle. In the rear of the trailer the girls saw Ellis' parked truck and the body of Lamar Lafferty lying on the ground. Petitioner then took them inside the trailer where he made them lie on their stomachs and tied their hands and feet with haystring. During this time, Dyess was carrying guns out of the bedroom and two-year-old Brandon Lafferty was sitting on the sofa. Petitioner told Marty and

B.B. to tell the police that two black men had committed the crimes. He threatened to return and kill them if they did not tell this story. When all the guns had been removed from the house, petitioner and Dyess left.

The two girls then began attempting to get lose. Using their fingernails, they finally cut through the string which bound their feet and then found a knife in the kitchen to cut their hands loose. They looked out the window and saw that Ellis' truck was gone. Seeing no one about, they gathered up the baby and got in their car and went to a friend's house where they called the police.

Petitioner and Dyess apparently fled to New Orleans, Louisiana, as Ellis' truck which was recovered in Florida on May 6, 1986, had New Orleans parking tickets under the seat. Assistance of the New

Orleans Police Department was requested in an attempt to locate petitioner and Dyess. The search was fruitless as petitioner and Dyess had left New Orleans for Mexico by bus.

While in Mexico, petitioner and Dyess had a disagreement, and they parted company. Petitioner hitchhiked to California where he changed his name and procured a birth certificate and driver's license in the name of David Prokaska.

On August 22, 1986, petitioner was arrested in Lemon Grove, California. He was later transferred to the San Diego Police Department. The Mississippi authorities were contacted, and Deputy Denham was dispatched to California on August 24, 1986. While in the San Diego County jail, petitioner made a statement admitting his participation in this crime.

Petitioner waived extradition and returned to Mississippi with Denham.

B. **Procedural History:**

Petitioner was indicted for two counts of capital murder by the grand jury of the Circuit Court of Clarke County, Mississippi, on September 9, 1986. This indictment grew out of the robbery and murders of Lamar Lafferty and Donald Ellis Thomas. Minnick was also indicted as an habitual offender. A motion for change of venue was granted, and the trial was moved to Lowndes County, Mississippi. The trial began on April 6, 1987. The jury returned a verdict of guilty as charged to both counts of capital murder. At the conclusion of the sentence phase of the trial, on April 9, 1987, the jury returned a sentence of death for each capital murder conviction.

Minnick then took his automatic appeal to the Mississippi Supreme Court raising twenty-one (21) assignments of error. On December 14, 1988, the Mississippi Supreme Court, by an eight to one vote, affirmed the convictions and sentences of death in a written opinion. Minnick v. State, 551 So.2d 77 (Miss. 1988), JA 69. A timely petition for rehearing was filed by petitioner with the court below. A response by the state to the petition was called for by the Court. On October 25, 1989, the court below denied the petition for rehearing without further opinion. From the opinion affirming the convictions and sentences of death, petitioner brought a petition for certiorari to this Court. This Court granted certiorari on April 23, 1990.

SUMMARY OF THE ARGUMENT

The Mississippi Supreme Court correctly found that Edwards v. Arizona, 451 U.S. 477 (1981) allows law enforcement officers to reinitiate contact with a suspect once counsel has actually been consulted to determine if he is now willing to talk with the officers. If he is willing to talk and waives his right to have counsel present any statement may be used in a prosecution against him. Further, the court below correctly found that petitioner had freely, voluntarily and intelligently waived his Fifth Amendment right to counsel.

The question relating to the Sixth Amendment right to counsel was not presented in the petition for certiorari and should not be addressed. However, since the Sixth Amendment right to counsel

had not attached in the case at bar there has been no violation of the federal constitution.

ARGUMENT

I.

Whether, Once An Accused Has Expressed His Desire To Deal With Law Enforcement Officers Only Through Counsel, The Police May Reinitiate Interrogation In The Absence Of Counsel As Soon As The Accused Has Completed One Consultation With A Lawyer?

Petitioner claims in his brief on the merits that he was denied his rights under the Fifth and Sixth Amendments[2] when his confession given to a Mississippi deputy sheriff was admitted into evidence. He

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[2] Petitioner did not raise a claim under the Sixth Amendment in his petition for certiorari. The addition of this claim is a drastic expansion of the grounds upon which certiorari was granted and should not be allowed. While maintaining that issue should not be reached, respondent has addressed it in the alternative, infra.

claims that the introduction of the confession violates the teachings of Edwards v. Arizona, 451 U.S. 477 (1981) and Michigan v. Jackson, 475 U.S. 625 (1986). His basic contention is that once he has invoked his right to counsel he can never waive the right to have counsel present when he is interrogated. Respondent submits that neither the Fifth nor Sixth Amendment can be read so broadly as to make one a prisoner of his own rights. This is especially true when one has consulted with counsel on at least two occasions and then admits that he intended to talk to the officer to whom he gave the confession.

THE FIFTH AMENDMENT CLAIM

Petitioner asserts that the Fifth Amendment was violated when his incriminating statements made to Deputy J.C. Denham, a Clarke County, Mississippi,

deputy sheriff, were introduced into evidence at his trial for two capital murders. He bases his claim on the prophylactic rule created by this Court in Edwards v. Arizona, 451 U.S. 477 (1981) in which this Court held that when one in custody invokes his right to counsel under Miranda v. Arizona, 384 U.S. 436 (1966),[3] he ". . . is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." 451 U.S. at 484-485. Petitioner insists that counsel must be present at any substantive contact he has with the authorities from that point forward. The question here

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3 Miranda created the original prophylactic rule to insure that a suspect's right to remain silent was observed during the interrogation process.

turns on the implications of the phrase in Edwards which reads "until counsel has been made available" to the suspect.

The Mississippi Supreme Court found that Minnick, while being questioned by agents from the FBI, had invoked his right to counsel, and that invocation had been honored by those agents. The court below further found that Minnick was furnished counsel and actually consulted with counsel prior to the time he was interviewed by Deputy Denham. The court then concluded that the Fifth Amendment had been satisfied by Minnick's consultation with counsel. The Mississippi court held that since Minnick had actually consulted with counsel, "Edwards [sic] bright line

rule as to initiation does not apply." 551 So.2d at 83, JA 76.[4]

Petitioner contends that the Mississippi court misreads the precedent of this Court when that court states that the key phrase in Edwards is "until counsel has been made available to him." 551 So.2d at 83, JA 76. This quote from Edwards was used by the Court in Patterson v. Illinois, 487 U.S. 285, 291 (1988) (a Sixth Amendment case), Arizona v. Roberson, 486 U.S. 675, 678 (1983) and cited with emphasis in Oregon v. Bradshaw, 462 U.S. 1039, 1043 (1983) indicating that it is not mere dicta. A fair reading of

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[4] Other courts presented with this question have reached similar results. See, United States v. Hall, 905 F.2d 909 (6th Cir. 1990); United States v. Halliday, 658 F.2d 1103 (6th Cir.), cert. den., 454 U.S. 1127 (1981); State v. Grizzle, 293 S.C. 19, 358 S.E.2d 388 (1987), cert. den., 484 U.S. 1012 (1988); State v. Cody, 323 N.W.2d 863 (S.D. 1982).

Edwards allows the holding of the court below easily to be squared with the concerns of the Court in Edwards.

Reading Edwards, one finds it contains two situations in which the state may attempt to re-question a suspect after he has invoked his right to counsel. The first situation is when the suspect reinitiates the contact with the police after he has invoked his right to counsel. Oregon v. Bradshaw. The second situation under which the police can attempt the re-questioning of a suspect arises when the suspect requests counsel and is actually furnished with counsel. After the suspect has consulted with counsel, the police may reapproach the suspect to determine whether he is now willing to talk with the officers.

This second situation in Edwards has received little analysis since the

majority of the cases dealing with the prophylactic rule of Edwards rest on a factual background different from the one at bar. The familiar Edwards scenario is one in which proper warnings are given under Miranda, and the suspect invokes his right to counsel. After the right to counsel has been invoked, the police either continue to question the subject, ignoring his invocation, or they stop questioning the suspect, but reinitiate the questioning prior to furnishing of counsel. Therefore, the Court has never been presented with the factual situation which allowed it to address fully the second manner in which a suspect can be re-questioned under Edwards after the right to counsel has been invoked.

Looking to the purpose of the rule in Edwards, we note that the Court has stated that neither this nor the Miranda rule

from which it is derived, is required by the Fifth Amendment. Rather these rules are used as a prophylactic to protect the Fifth Amendment right to be free from the coercive effects of being in custody. Miranda.

The Court has held that when an accused reinitiates communication with the police prior to being furnished counsel, there is no violation of Edwards. In this scenario nothing has occurred to indicate that the coercive atmosphere of being in custody has been dissipated in any manner. However, when counsel has been furnished, and consultation has taken place between the suspect and counsel, the psychological pressures of being in custody are greatly reduced, if not completely removed. Consultation with counsel restores the equilibrium by removing the coercive elements of custody. If a suspect invokes

his right to counsel and is actually furnished counsel, he would have no reason to doubt that his request to have counsel present would again be honored, if made, at any reinitiated contact by the police. Further, after consultation with counsel, there is much less likelihood that he will be coerced into giving a statement against his interests than before such consultation. Clearly he will have been given advice concerning the implications of making statements that go far beyond that required by Miranda. This is why the court below found that Edwards allows contact to be reinitiated by the police after counsel has been made available to the accused. The Mississippi Supreme Court correctly held that the "bright-line rule as to initiation does not apply." JA 76.

The respondent does not suggest that the police should be allowed repeatedly to approach the suspect in an attempt to wear down his resistance. Oregon v. Bradshaw, at 1044, clearly condemned this particular behavior by police. Minnick was not repeatedly approached.

After a suspect has conferred with counsel the police should be allowed to reapproach him and inquire if he has talked with his attorney. If the suspect says yes, then the officer should give the suspect proper Miranda warnings and ask if he is now willing to speak with the officer. If the answer is no, the officer must then leave. If the answer is yes and the suspect talks with the officer, any statement made can then be used against the suspect. It goes without saying that the suspect can at any time during this re-questioning invoke his rights and

conclude the interview by refusing to answer further questions or requesting the presence of his attorney. The invocation of the right to silence or counsel must be honored as the opinions of this Court require. Obviously, the prisoner will with confidence assert these rights if he desires to curtail further questioning since he knows the police had previously honored his request prior to consulting with counsel.

The question then becomes: under what circumstances can this reapproach be made. Of course, if the officer has actual knowledge or objective indications[5] that the suspect has, in fact, consulted with counsel, the reapproach can be made.

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5 These objective indications include, but should not be limited to, jail logs and oral or written reports of fellow officers.

If these objective indicia do not exist,[6] an officer should be allowed to reapproach the suspect after a reasonable time and make inquiry as to whether or not he had spoken with counsel. If the answer is no, then the contact must cease. All this is stated with the full recognition that the state must still show that any resulting waiver was voluntarily, knowingly and intelligently made. Edwards, at 484; Johnson v. Zerbst, 304 U.S. 458 (1938). This procedure accommodates the language of Edwards. It likewise would give the Court a "bright-line" rule to govern this activity which still permits appropriate, non-coercive investigatory proceedings.

Alternatively, should the Court find that the reasoning of the court below

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6 An officers constructive knowledge of consultation with counsel is discussed, infra.

allowing reinitiation of questioning by the police is flawed, then we must look to the facts of the case sub judice. These facts show that Minnick actually invited the reinitiation of further conversations with the authorities and then freely and voluntarily waived his right to have his counsel present when he was interviewed by Deputy Denham.

The record shows that petitioner was arrested on August 22, 1986, by the Lemon Grove, California, police on two outstanding Mississippi warrants for capital murder and a federal warrant for interstate flight to avoid prosecution. Later that same day he was transferred to the San Diego County jail. Thereafter, the Mississippi authorities were notified of Minnick's arrest.

On August 23, 1986, two special agents of the Federal Bureau of Investiga-

tion interviewed petitioner in the San Diego County jail. Petitioner was fully advised of his rights according to Miranda. JA 14. Minnick stated that he was willing to answer some questions; however, he stated that he did not want to sign anything. He told the agents to ask whatever questions they wanted to ask. After telling the agents of his escape from the Clarke County jail and the events leading up to the murders of Thomas and Lafferty, Minnick hesitated. The agents reminded him that he did not have to answer questions without his attorney present. Minnick told the agents to "Come back Monday when I have a lawyer." He then stated that he would make a more complete statement with his lawyer present. He again told the agents to come see him on Monday as soon as he had a lawyer. JA 16. The FBI agents honored

this request and ceased questioning him about the crime.

After the FBI interview, Minnick was furnished an attorney and consulted with him. At the suppression hearing, Minnick stated:

> I talked to him two different times and -- it might have been three different times -- but I talked to him the day he told me the next day he would get the court order. He told me that first day that he was my lawyer and he was appointed to me and to not talk to nobody and not tell nobody nothing and to not sign no waivers and not sign no extradition papers or sign anything and that he was going to get a court order to have any of the police -- I advised him of the FBI talking to me and he advised me not to tell anybody anything that he was going to get a court order drawn up to restrict anybody talking to me outside of the San Diego Police Department. [Emphasis added.]

JA 46-47.

Late on Sunday, August 24, 1990, Deputy Denham arrived in San Diego from

Mississippi. The next morning he went to the San Diego County jail and asked to interview Minnick. Minnick was brought to an interview room in the jail. The first thing Denham did upon entering the room with Minnick was to advise Minnick of his Miranda rights. Petitioner told Denham that he understood his rights. After being read the waiver form, petitioner indicated that he understood that he had the right to have an attorney present at this interview. However, Minnick did not inform Denham that he had been interviewed by the FBI and that he had been furnished an attorney, nor did he request that his attorney be present at the interview with Denham.[7] JA 38, 56-57

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[7] Petitioner makes the assertion that Denham had a duty to inquire as to whether or not petitioner had requested or been appointed counsel. The record reflects that Denham apparently did just that. At the hearing on the motion in

Minnick informed Denham that he was not going to give a signed statement but that he wanted to talk with him. JA 29.

The conversation between Minnick and Denham began with Minnick telling Denham it had been a long time since he had seen him, and he had been expecting someone from Mississippi to show up in California

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limine the following colloquy took place:

> BY THE COURT: Did any of the people in California that you talked with say that the defendant wanted an attorney or advised the he would have an attorney?
>
> A. They advised that he would have an attorney with him during the extradition period whenever one would be needed.
>
> . . .
>
> CROSS EXAMINATION BY MR. GATES:
>
> Q. Do you know whether or not an attorney had been appointed for him?
>
> A. No. I don't.
>
> JA 56-57.

looking for him. Minnick then asked Denham how his family and friends in Mississippi were doing. Denham then asked if Minnick "would tell [him] what happened as far as them leaving the jail and what took place the next day." JA 31. From this chat about family and friends the conversation moved to the subject of Minnick's escape and then to the murders. During this conversation Minnick told Denham of his involvement in the murders of Thomas and Lafferty.

The intent to convey to Denham his participation in the murders is clearly expressed in Minnick's testimony during the hearing on his motion to suppress the confession.[8] Further, it is clear from this same testimony that Minnick under-

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[8] This same passage answers any question regarding petitioner's claim that he told the San Diego County officers that he did not want to see Denham.

stood his rights concerning self incrimination. The following colloquy took place between the prosecutor and Minnick at trial:

> Q. The truth of the matter is you know what your rights are and you are informed of your rights and you understood your rights, didn't you?
>
> A. I understood my rights and that's exactly why I told them that I wanted a lawyer and they was getting no kind of anything out of me for anything except when I talked to Jim Denham and stated the exact moment and the happening of the escape from the Clarke County Jail.
>
> Q. But, you continued to talk on to Mr. Denham about what happened in the murder, didn't you?
>
> A. You only have that down on paper. I'm denying that completely. I have already denied what he has down on paper because it's written up as "Robert Minnick advised so and so, Robert Minnick advised so and so", and there's no--nothing of anything to go along with it especially a signature and it states in one of the Mississippi law books that if one person

> does not freely and voluntarily give a statement to an official it is completely inadmissible--
>
> Q. Mr. Minnick, you're saying that you didn't even give the statement. Which is it? did you give the statement or did you not give the statement?
>
> A. No comment. I stand on the Fifth. [Emphasis added.]
>
> JA 52-53.

Minnick then refused to answer any further questions about his statement asserting his Fifth Amendment right against self-incrimination, refusing even to admit that he made any further statement to Denham.[9] JA 53-55.

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[9] It is apparent from the record that Minnick took great delight in second guessing his lawyers and expounding on his knowledge of the law. His familiarity with the law is apparent from statements made about former attorneys. He quipped that his lawyer on an earlier conviction was "not any good." He boasted that "[a]fter arriving at prison and studying law for my own person in the law library" he could have represented himself before a jury and gotten acquitted of the charges. JA 51.

Denham's testimony during the suppression hearing reveals that he had no personal knowledge at the time of the interview that Minnick had been interviewed by the FBI nor that Minnick had invoked his right to counsel during that interview. JA 37-38.[10] Denham testified that Minnick never asked to speak to an attorney while he was being questioned. JA 56. Denham stated that he did not know that an attorney had been appointed for Minnick at the time he

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10 Minnick contends that Denham had a copy of the FBI interview report prior to the time he interviewed the petitioner. This fact is refuted by the transcript. Denham's interview took place at 8:40 a.m. on August 25, 1986. JA 10, 28. The notations on the FBI report reflect that the report was dictated on August 24, 1986, and not transcribed until August 25, 1986. This transcript could hardly have been in Denham's hands prior to 8:40 in the morning. Further, Denham was informed of the Saturday FBI interview with petitioner only after his Monday interview. JA 37.

questioned him, and Minnick did not so inform him. JA 56-57.

Respondent recognizes that the FBI report states that Minnick told the agents to come back Monday when he had an attorney and that he would make a more complete statement with his attorney present. However, we also note that Minnick stated in his testimony at the suppression hearing that he intended to talk with Denham. Therefore, the fact that counsel was not present when Denham interviewed petitioner cannot be determinative of the issue. Using the reasoning of the Court in Michigan v. Harvey, 494 U.S. ___, 110 S.Ct. 1176, 108 L.Ed. 293 (1990), we submit that petitioner exercised his prerogative to waive his right to counsel without further consultation with or notice to his attorney. The Court stated in Harvey:

In other cases, we have explicitly declined to hold that a defendant who has obtained counsel cannot himself waive his right to counsel. See **Brewer**,, 430 U.S., at 405-406 ("The Court of Appeals did not hold, nor do we, that under the circumstances of this case Williams could not, without notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments. It only held, as we do, that he did not"; **Estelle v. Smith**, 451 U.S. 454, 471-472, n. 16 (1981) ("we do not hold that respondent was precluded from waiving this constitutional right [to counsel]. . . . No such waiver has been shown, or even alleged, here"). A defendant's right to rely on counsel as a "medium" between the defendant and the State attaches upon the initiation of formal charges, **Moulton**, 474 U.S. at 176, and respondent's contention that a defendant cannot execute a valid waiver of the right to counsel without first speaking to an attorney is foreclosed by our decision in **Patterson**. Moreover, respondent's view would render the prophylactic rule adopted in Jackson wholly unnecessary, because even waivers given during defendant-initiated conversations would be per se involuntary or otherwise invalid, unless counsel were first notified.

> Although a defendant may sometimes later regret his decision to speak with police, the Sixth Amendment does not disable a criminal defendant from exercising free will. To hold that a defendant is inherently incapable of relinquishing his right to counsel once it is invoked would be "to imprison a man in his privileges and call it the Constitution." **Adams v. United States ex rel. McCann**, 317 U.S. 269, 280 (1942). [Emphasis the Court's.]
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> 108 L.Ed.2d at 304.

While Harvey is a Sixth Amendment case, the reasoning is compatible with the situation at bar.

This is not a case where petitioner was being badgered by the police to change his mind about waiving his rights to counsel prior to counsel being furnished.[11] Quite the contrary, Minnick

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11 As noted above, this type behavior on the part of the police has been condemned by this Court in Edwards and Bradshaw, 462 U.S. at 1044.

invited the authorities to come and speak with him again, and Deputy Denham accepted his invitation.

Petitioner's argument that he misunderstood his rights and therefore did not voluntarily waive them is also unavailing.[12] The record reflects that petitioner refused to sign a waiver of his rights, refused to sign the statement he made and even asked if the interview was being taped. Petitioner here argues that these facts indicate that his misunderstanding of his rights removed the free and voluntary character of his waiver of counsel. In Connecticut v. Barrett, 479 U.S. 523 (1987), this Court found a similar argument unpersuasive. The Court said:

> We also reject the contention that the distinction drawn by Barrett between oral and written statements indicates an understanding of the consequences so incomplete that we should deem his limited invocation of the right to counsel effective for all purposes. This suggestion ignores Barrett's testimony--and the finding of the trial court not questioned by the Connecticut Supreme Court--that respondent fully understood the Miranda warnings. These warnings, of course, made clear to Barrett that "[i]f you talk to any police officers, anything you say can and will be used against you in court." App. at 48A. The fact that some might find Barrett's decision illogical is irrelevant, for we have never "embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness." **Elstad**, 470 U.S. at 316; **Colorado v. Spring**, post, p 564 (1987). [Footnote omitted.]
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> 479 U.S. at 530.

Petitioner clearly stated in the suppression hearing that he intended to talk with Denham and tell him about the escape. JA 52. It is apparent that he thought he

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12 See footnote 9, supra.

could tell the whole story of his nefarious deeds and then decide which parts could be used against him. By not signing the waiver of rights form, by refusing to allow the interview with Denham to be recorded, by refusing to sign a statement, and by pleading his Fifth Amendment right against self-incrimination at the suppression hearing, Minnick thought he could restrict the state's use of his statement to that portion dealing with the escape from the Clarke County jail. This misunderstanding, if it was one, led Minnick to make inculpatory statements to Denham regarding the murders of Thomas and Lafferty in Mississippi. However, this does not destroy the voluntary character of Minnick's whole statement. The full statement could properly be used against him. Barrett, supra.

The respondent acknowledges that the rule is that the knowledge of one officer in an agency concerning a defendant's invocation of his right to counsel or silence is imputed to everyone who deals with that defendant. United States v. Scalf, 708 F.2d 1540, 1544 (10th Cir. 1983) (Once a suspect has invoked the right to counsel, knowledge of that request is imputed to all law enforcement officers who subsequently deal with the suspect.) This rule is often draconian in its application, especially in a situation as here where officers of three separate sovereigns are involved. Here the record does not reflect whether the FBI Agents told the San Diego County jailers that Minnick invoked his right to counsel. It is clear that Denham had no actual knowledge of the invocation of the right to counsel, and he was not informed by the

San Diego officers or the FBI of this fact. Only after his meeting with Minnick and only after receiving the FBI report did Denham become aware of the prior invocation of the right to counsel. However, Denham acted within the law, having read the Miranda rights to Minnick, he followed the procedures as outlined in that case. It is clear from Minnick's testimony that he wanted to speak with Denham in spite of this invocation of the right to counsel made to the FBI agents.

Conversely, if the state is to be bound by the imputation of the knowledge of invocation of rights of which it has no actual knowledge, petitioner's invitation to the FBI to return and talk with him must also be imputed to the state. Cf. Scott v. United States, 436 U.S. 128, 137-38 (1978) (The fact that the officer does not have the state of mind hypothecated by

the reasons which provide legal justification for the officer's action does not invalidate the action taken so long as the circumstances, viewed objectively, justify that action.) The FBI agents had actual knowledge of petitioner's invitation to return on Monday; thus, this knowledge is imputed to Denham. Therefore, Denham's conversation with Minnick was invited by petitioner through the inverse of the same imputation rule. Petitioner initiated the conversation with Denham when he invited the FBI to return on Monday.

Edwards allowed Denham to reapproach Minnick after he had been allowed to consult with counsel and inquire whether or not he would submit to further questioning. Minnick could have told Denham that he would not talk with him or that he wanted his counsel present, both rights that he knew that he had. Therefore, the

Mississippi Supreme Court correctly found that the contact Denham made with Minnick was permissible under Edwards, and the waiver of the right to counsel at that point was free and voluntary.

THE SIXTH AMENDMENT CLAIM

Petitioner did not raise a claim under the Sixth Amendment in his petition for certiorari; therefore, this Court should not consider this claim presented for the first time in the Brief for Petitioner.[13] This Court held in General Talking Pictures Corporation v. Western Electric Company, 304 U.S. 175 (1937):

> One having obtained a writ of certiorari to review specified questions is not entitled here to obtain decision on any other issue. Crown Cork & Seal Co. v. Ferdinand Gutmann Co.__decided this day [304 U.S. 159, ante]. Petitioner is not here entitled to decision on any question other than those formally presented by its petition for the writ.
>
> 304 U.S. at 179.

Likewise, the rules of this Court do not allow a party to raise in the brief on the merits ". . . additional questions or change the substance of the questions already presented" in the petition for writ of certiorari. Sup. Ct. Rule, 24.1(a). Respondent submits the Sixth Amendment question was not presented in the petition for writ of certiorari; and, therefore, the question should not be reached or addressed.

While still maintaining that petitioner's Sixth Amendment claim was not presented in the petition for certiorari and therefore is not before the Court,

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13 In his petition for certiorari petitioner stated, "In the context of the Sixth Amendment right to counsel, this question would obviously not arise." Petition at 11. Clearly the petition for certiorari was concerned only with the Fifth Amendment claim.

respondent feels compelled to address the claim alternatively.

The respondent would first submit that petitioner's right to counsel had not attached under federal law at the time he gave his incriminating statement. We recognize that petitioner relies heavily on the language in the opinion below stating:

> Minnick argues further that his Sixth Amendment right to counsel under Mississippi law had attached by the time of the Denham interview since warrants for his arrest had issued; the state does not dispute this. See, e.g., **Livingston v. State**, 519 So.2d 1218, 1221 (Miss. 1988).

551 So.2d at 83, JA 76.

The key phrase here is "under Mississippi law." The Mississippi Supreme held in Livingston v. State, 519 So.2d 1218 (Miss. 1988), that the right to counsel in the Sixth Amendment sense attaches at the time

an arrest warrant is issued. This holding in Livingston is based on Miss. Code Ann. § 99-1-7 (1972) and the opinion in Cannaday v. State, 455 So.2d 713 (Miss. 1984). Miss. Code Ann. § 99-1-7 (1972) reads:

> A prosecution may be commenced, with the meaning of section 99-1-5 by the issuance of a warrant, or by binding over or recognizing the offender to compel his appearance to answer the offense, as well as by indictment or affidavit.

When we look to Miss. Code Ann. Section 99-1-5 (1972) we find that it is a statute dealing with statute of limitations for prosecutions for certain crimes. This does not in any manner involve the Federal Sixth Amendment right to counsel. Even more revealing is the language of the court below in Cannaday. The court held:

> Secondly, defense relies upon the Sixth Amendment to the United States Constitution providing that "(I)n all

criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense." The Sixth Amendment rights are applied to state prosecutions through the Fourteenth Amendment of the United States Constitution. **Watson v. State**, 196 So.2d 893 (1967), **Powell v. Alabama**, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (9132).

Mississippi jurisprudence has the same constitutional, and statutory provisions, and rules guaranteeing these same rights. Mississippi Constitution Art. 3, Section 26 provides that "(I)n all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both, . . . and he shall not be compelled to give evidence against himself; . . . " Also, see Mississippi Code Annotated section 99-15-115 (1972) and Mississippi Criminal Rules of Procedure, Rule 1.03, 1.05.

Since the Mississippi jurisprudence provides an adequate and equal basis for these constitutional rights, we base our opinion herein on Mississippi law, notwithstanding the fact that reference is made to federal cases. The federal cases are used for the purpose of guidance, but Mississippi jurisprudence compels the

result. Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). [Emphasis added.]

455 So.2d at 722.

Finally, the citation of Page v. State, 495 So.2d 436 (Miss. 1986) likewise falls short of supporting petitioner's position. Page clearly rejects federal law as the basis of its decision. In footnote five the Court states:

> We are very much aware of the fact that a number of recent federal cases have held that the right to counsel secured by the Sixth Amendment to the Constitution of the United States is available only after the initiation of judicial criminal proceedings, i.e., indictment and arraignment. . . . [W]e reject the federal approach and for purposes of today's decision rely exclusively upon state law. [Emphasis added.]

495 So.2d at 440.

Since the Mississippi Constitution does not so conveniently divide the parallel rights found in the Fifth and Sixth

Amendments of the federal constitution it is often easier to speak of the state constitutional right with reference to the corresponding federal right. Clearly that is what was done here by the state co rt as the Sixth Amendment right to counsel had not attached according to federal law.[14] Mississippi law enforcement officials and prosecutors must deal with this broader reading of the right to counsel under state law. This Court has held that a state court is free to read its own constitution more broadly than this Court reads the United States Constitution. City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982). However, a broader reading by a

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[14] Likewise, the admission that the Sixth Amendment right had attached, found in the respondent's brief on direct appeal to the court below, is prefaced by the statement "under Mississippi law." JA 68.

state court is not binding on this Court. Further, this Court is not bound by a state law interpretation of federal law that conflicts with established precedent of this Court. This Court is the final arbiter of when the Sixth Amendment right to counsel attaches. Coleman v. Alabama, 399 U.S. 1, 9 (1970).

We know that the federal Sixth Amendment right attaches when adversary judicial criminal proceedings are initiated by the state. Kriby v. Illinois, 496 U.S. 682, 689 (1972) (plurality opinion). In Mississippi an arrest warrant is issued in an ex parte proceeding as it is in the federal system. Miss. Code Ann. §99-3-21 (1972). The issuance of an arrest warrant is not a commitment by the state to prosecute the person arrested. The prosecutorial forces of the State of Mississippi are not

brought to bear on petitioner simply by the issuance of an arrest warrant. He is not being confronted by the full panoply of the prosecutorial system at this stage of the proceedings. The issuance of an arrest warrant has never been held to be the trigger that activates the federal Sixth Amendment right to counsel. United States v. Gouveia, 467 U.S. 180, 190 (1984). Minnick's federal Sixth Amendment right to counsel had not attached at the time that Denham questioned him as the mere issuance of an arrest warrant is insufficient to implicate that right.

There has been no violation of the federal constitution cognizable by this Court.[15]

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[15] Even if the Sixth Amendment were somehow found to apply to this case, the trial court found that Minnick had knowingly, intentionally and voluntarily relinquished his right to counsel. This finding was upheld by the court below.

CONCLUSION

For the above and foregoing reasons the decision of the Mississippi Supreme Court affirming the convictions and sentences of death in this case should be affirmed.

Respectfully submitted,
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August 27, 1990

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551 So.2d at 85, JA 80. This court has held that informing a suspect of his rights according to Miranda are sufficient to place him on notice of his Sixth Amendment right to counsel. If an indictee then waives his right to counsel after being informed of these rights, that waiver is sufficient to allow use of any statement he makes so long as it is free and voluntary. Patterson v. Illinois, 487 U.S. at 292, 299-300. Even where counsel has been obtained by a suspect, the right to have counsel present can be waived. Brewer v. Williams, 430 U.S. at 405-406. The court below properly found that Minnick waived his Sixth Amendment rights under state law.

CERTIFICATE OF SERVICE

I, Marvin L. White, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first-class postage prepaid, three (3) true and correct copies of the foregoing Brief for Respondents to the following:

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This the 27th day of August, 1990.

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MARVIN L. WHITE, JR.